

Consideration of objections and with respect to “Findings of Fact and Conclusions of Law with Nonfinal Order” by the Special Administrative Law Judge in *Moriarity v. Department of Natural Resources*, Administrative Cause No. 12-094W:

- Findings of Fact and Conclusions of Law with Nonfinal Order, dated April 15, 2015
- Moriaritys’ Objections to Findings of Fact, Conclusions of Law and Nonfinal Order
- Respondent’s Response to Claimants’ Objections to Findings of Fact, Conclusions of Law, and Nonfinal Order

**BEFORE THE
NATURAL RESOURCES COMMISSION
OF THE
STATE OF INDIANA**

IN THE MATTER OF:

MAE E. MORIARITY, JOHN E. MORIARITY)	
And JOHN E. MORIARITY AND MAE E.)	
MORIARITY, husband and wife)	Administrative Cause
Claimants,)	Number: 12-094W
vs.)	
DEPARTMENT OF NATURAL RESOURCES,)	(NOV VTS-3933-DM)
Respondent.)	

**FINDINGS OF FACT, CONCLUSIONS
OF LAW AND NONFINAL ORDER**

A. Statement of the Proceeding and Jurisdiction

1. By their attorneys on June 13, 2012, Mae E. Moriarity, John E. Moriarity, and John E. Moriarity and Mae E. Moriarity, Husband and Wife (the "Moriaritys") filed a "Petition for Administrative Review" with the Natural Resources Commission (the "Commission") in which the Moriaritys sought administrative review of NOV VTS-3933-DM (the "subject NOV") issued by the Department of Natural Resources (the "DNR"). The subject NOV averred the Moriaritys violated IC § 14-27-7.5 (sometimes referred to as the "Dams Safety Act") and IC § 14-28-1 (sometimes referred to as the "Flood Control Act"). The Petition for Administrative Review initiated a proceeding that is controlled by IC § 4-21.5 (sometimes referred to as the "Administrative Orders and Procedures Act" or "AOPA") and rules adopted by the Commission at 312 IAC § 3-1 to assist with implementation of AOPA. The Moriaritys and the DNR are collectively the "parties".
2. Judge Stephen Lucas was appointed as the administrative law judge under IC § 14-10-2-2. Judge Lucas served a "Notice of Prehearing Conference" upon the parties. The initial prehearing conference was conducted as scheduled in Indianapolis on July 20, 2012. The Moriaritys appeared by their attorneys and in person. The DNR appeared by its attorney and through a Division of Water representative.

3. On May 7, 2013, Judge Lucas issued his Modified Interlocutory Order with Respect to Claimants' Motion for Summary Judgment. Judge Lucas partially granted summary judgment in favor of the Moriaritys. Judge Lucas determined that the subject NOV was insufficient as a matter of law as it pertains to relief sought by the DNR under the Flood Control Act and 312 IAC 10. Further, Judge Lucas concluded that there continued to be a genuine issue of material fact as to whether the Moriaritys were in violation of the Dams Safety Act and 312 IAC 10.5. The DNR has the burden of going forward and the burden of persuasion with respect to the elements of the subject NOV pertaining to the Dams Safety Act (I.C. §14-27-7.5 et seq.) and 312 IAC 10.5.
4. The final hearing in this matter began on November 21, 2013, with Judge Lucas presiding.
5. The hearing was not concluded on November 21, 2013 and was reset. For various reasons, the hearing was continued. Prior to the conclusion of testimony, Judge Lucas retired from state service.
6. On August 15, 2014, Judge Lucas issued an "Order Setting Panel and for Striking. Upon the completion of striking, on August 22, 2014, with the express consent of the parties, Catherine Gibbs was appointed as Special Administrative Law Judge by Judge Lucas.
7. The hearing concluded on December 2 and 3, 2014, with Special ALJ Gibbs presiding.
8. The parties expressly consented to and waived any objections to Special ALJ Gibbs conducting the hearing and making findings based upon the testimony given on December 2 and 3, 2014 and the recorded testimony given on November 21, 2013.
9. The parties stipulated to the admissibility of Exhibits 1 through 24.
10. The Commission is the "ultimate authority" under AOPA and IC § 14-10-2-3 for administrative review of DNR notices of violation, including those under the Dams Safety Act and the Flood Control Act. Generally, *Yoder v. DNR & Bouwkamp*, 12 Caddnar 88 (2009).¹
11. The Commission has jurisdiction over the subject matter and over the persons of the parties.

¹ As provided in Ind. Code § 4-21.5-3-32, an agency is required to index final orders and may rely upon indexed orders as precedent. Caddnar is the Commission's index of final orders.

B. Findings of Fact

1. The following findings of fact were entered by Judge Lucas on May 7, 2013 as part of the Modified Interlocutory Order with Respect to Claimants' Motion for Summary Judgment. Findings of Fact (a) through (g) are expressly adopted from Judge Lucas' Modified Order and incorporated into this Order.
 - a. John E. Moriarity and Mae E. Moriarty own real property as Husband and Wife in Section 15 and Section 16, Township 24 North, Range 8 East, Van Buren Quadrangle, Grant County, Indiana (the "Moriarity real-estate").
 - b. The Moriaritys caused a water impoundment to be constructed on the Moriarity real estate.
 - c. The impoundment was constructed without the prior written approval of the DNR and without a DNR permit.
 - d. The impoundment is formed by a dam that impounds a volume of water which greatly exceeds 100 acre-feet.
 - e. Because it does not qualify for an exception under I.C. § 14-27-7.5-1, the dam that forms the water impoundment is part of a "structure" as defined at I.C. § 14-27-7.5-5. The structure is in operation and is subject generally to the Dams Safety Act.
 - f. The Moriaritys are collectively the "owner" of a structure as defined at I.C. § 14-27-7.5-4.
 - g. The subject NOV was issued by the DNR against the Moriaritys on May 14, 2012. A true and accurate copy of the subject NOV is incorporated herein.
2. The water impoundment was constructed sometime between 1998 and 2000.
3. On November 21, 2013, the parties stipulated that the dam structure is more than 20 ft high in some spots and impounds more than a volume of 100 acre-feet of water.
4. On November 21, 2013, the parties further stipulated that the Moriaritys did not apply for or obtain a permit to build the dam from the DNR.
5. The Moriaritys stipulated to Ken Smith's qualifications. Mr. Smith testified that he observed streams on the Moriarity real estate.
6. Photographs 32, 33, and 34, taken in 2008 and admitted as part of stipulated Exhibit 7, show water flowing in a defined channel, rather than flowing over the entire surface of

the ground. Exhibit 7, photographs 19, 20, and 21 show the culvert through which water is flowing in a defined channel.

7. Photographs 31, 32, 33, and 34² show a small wooden footbridge, under which water flows to the lake in a defined channel.
8. Mr. Smith, based on his observations, believes that this dam qualifies as a high hazard dam. Exhibit 11, Photograph 138 clearly shows a building in close proximity to the dam. Further, George Crosby presented uncontroverted testimony that the road, also seen in Photograph 138, is a heavily traveled road.
9. DNR presented evidence of the dam's many deficiencies, which could lead to a failure. Exhibit 11, Photographs 138 and 139 show a sinkhole. Exhibit 11, Photographs 140, 141 and 142 show water, a sign of seepage. Exhibit 11, Photograph 146 provides evidence of failure to properly compact the soil. Exhibit 11, Photographs 154 and 155 show deficiencies in construction and the materials used for the dam. Exhibit 11, Photographs 167 and 168 show seepage, again an indication of deficiencies in the dam construction and design.
10. Exhibit 2 shows intermittent streams in the area of the Moriarity Lake and on the Moriarity real estate.
11. Rodney Neese surveyed Moriarity Lake in 2007. His observations and survey were documented in Exhibit 6A through 6E. He observed streams flowing through a pipe in both areas D and area C. He saw streams at inlet pipes 1 and 2. He observed defined channels at Inlet Pipes 1 and 2. The "V" shapes seen on 6A and 6B are indicative of stream channels. He concluded that there are streams on the Moriarity real estate.
12. Jon Eggen also visited the Moriarity real estate. He observed streams and, in particular, he noted a meandering stream channel. These features were obscured by various activities undertaken at the Lake, including earthmoving and flooding.
13. The DNR witnesses relied on various maps to determine whether streams exist on the Moriarity real estate, including aerial photography, soil maps and Stream Stats³. Exhibit 25 and 26 confirm the presence of streams. Exhibit 2 supports the conclusion that there were intermittent streams going into the Lake. The DNR witnesses did not rely on

² Part of stipulated Exhibit 7.

³ An on-line GIS program, topographic map which maps water features, including streams.

topographic maps (Exhibit 1), as the scale of this Exhibit does not show sufficient details. The DNR witnesses did not use Exhibit 16, Streams and Lakes of Indiana, to determine whether streams exist on the Moriarity real estate, as this Exhibit did not provide sufficient detail and further was not meant to be a reliable source of accurate information. Exhibit 17 was also not used to determine if streams existed on Moriarity real estate. This Exhibit was specifically restricted to drainage areas of at least five miles. No one contended that this applied to the Moriarity real estate. Exhibit 18 was used to determine the owner of the Moriarity real estate.

14. Gary Miller qualified as a hydraulic engineer. While he did not visit the Moriarity real estate, he reviewed the materials available on the Moriarity real estate, including the aerial photographs and Stream Stats. He concluded after a review of all documents that there were streams in the Moriarity Lake, based on the following definition: a channel which captures surface water runoff into channel for flow.
15. Suzanne Dealy testified that she did a breach analysis of this impoundment. The analysis confirmed that the impoundment constituted a high hazard dam. Ms. Dealy's conclusions were submitted as Exhibit 24.
16. George Crosby also testified for the DNR. His conclusions were that the Moriarity Lake was created by damming streams. During his visits to the Property, he observed flowing water in defined channels in the area B.
17. The U.S. Geological Survey examined the soil survey maps and concluded that there were seven (7) first-order intermittent channel segments and one (1) second-order intermittent channel segments that crossed the Moriarity real estate. Exhibit 23.
18. Exhibit 11, Photograph 138 evidences the proximity of the dam to a church and a road, which Mr. Crosby describes as a high traffic road.
19. Heather Bobich testified for the Moriaritys regarding the presence of streams on the Moriarity real estate. She used regulatory guidance by the Army Corps of Engineers, which defines a stream as a landform with an ordinary high water mark. This is the only definition she used in her conclusion that no streams existed on the Moriarity real estate. She used Stream Stats to delineate the watershed. She noted that 2012 was a hot and very dry year.

20. She visited the Moriarity real estate in 2012. She inspected the Moriarity real estate for dry stream beds or other indications of streams that met the morphology of a stream. She observed no channels or ordinary high water marks. In her opinion, an ordinary high water mark is essential to identification of streams. She did not observe a barren wave swept shore near the lake. She reviewed the photographs admitted as Exhibit 7. Her conclusions were that the photographs showed standing water or wetlands. She further testified that none of the photographs showed a continuous ordinary high water mark.
21. She also relied on her observations of plant growth in determining whether streams existed on the Moriarity real estate. She opined that one indication of a stream would be a change in plant growth. She did not see such a change in the plant growth in the photographs admitted into evidence.
22. She did not observe any landform with a channel with defined banks, cut by erosion of water through turf or soil with a bottom over which water flows for a substantial period of the year or any landforms indicative of a watercourse as defined in I.C. § 14-8-2-304. She did not see any channels, remnants or evidence of intermittent or ephemeral streams.
23. John Moriarity contacted the local area plan commission, the Army Corps of Engineers and the Indiana Department of Environmental Management to determine the requirements that these agencies might impose. He complied with instructions from the IDEM. He also contacted the DNR in 2002 requesting information regarding whether a permit was needed and what type of permit was needed. Further, after consultation with the DNR, he undertook modifications to the dam, such as the removal of trees and modifications to the spillway. The Moriaritys established a wildlife habitat on the Moriarity real estate.
24. Scott Dierks reviewed the breach analysis conducted by Suzanne Dealy. He found deficiencies in the analysis. One deficiency was the assumption about the water elevation. The DNR surveyor noted that the low point of dam is 858.7 feet. The analysis assumes the low point is 861 feet before the Probable Maximum Precipitation (PMP) rain event occurs. The affect of this error would be to overstate the depth of water and velocity of the water released in a breach.
25. Mr. Dierks also testified about Exhibit O. This Exhibit demonstrates an error in the breach modeling. His analysis of the cross-sections prepared by the DNR demonstrates

that the DNR model failed to use complete water paths in two (2) of the three (3) modeled flow paths. Exhibit P, which he prepared, projects the continuation of water flow in the topography around the Moriarity Lake.

26. He pointed out that the affect of these errors would be to lower the depth and velocity of a flood as a result of a dam failure. Further, he pointed out the breach analysis does not account for the effect the overflow path shown in area G on Exhibit 6D would have on the depth and velocity of a breach.
27. He concluded that the DNR's breach analysis does not present a scientifically valid projection of what would occur in the event of a breach because of alleged errors in: (1) the starting surface elevation in the lake; (2) the height to which water would rise in the lake; and (3) how water moves across the landscape. He concluded that the effect of a breach is overstated due to assumptions used in the model. However, he did not determine which classification this dam fell under or whether the dam was a high hazard dam based on the assumptions he would have used in place of the assumptions used by the DNR.
28. Ms. Delay rebutted some of these points. She stated that elevation of 861 was provided by the survey conducted by Mr. Neese. She further explained the principle of ineffective flow. This principle reflects that water will not effectively flow across areas where pooling occurs and accounts for the vertical walls shown in Exhibit O. She stated that the breach analysis takes ineffective flow into account. She included only the effective flow area in determining whether the dam was a high hazard dam. The model thus reflects the effective flow area for breach locations and flow paths she modeled.

C. Conclusions of Law

29. The Subject NOV was issued by the DNR pursuant to its authority under I.C. §14-25.5.
30. The Commission is the "ultimate authority" under AOPA and IC § 14-10-2-3 for administrative review of DNR notices of violation, including those under the Dams Safety Act and the Flood Control Act. Generally, *Yoder v. DNR & Bouwkamp*, 12 Caddnar 88 (2009).⁴

⁴ As provided in Ind. Code § 4-21.5-3-32, an agency is required to index final orders and may rely upon indexed orders as precedent. Caddnar is the Commission's index of final orders.

31. The Commission has jurisdiction over the subject matter and over the persons of the parties.
32. I.C. §14-27-7.5 is referred to for purposes of this proceeding as the Dams Safety Act.
33. Judge Lucas concluded that the subject NOV was insufficient as a matter of law as it pertains to relief sought by the DNR under the Flood Control Act and 312 IAC 10. This conclusion is expressly incorporated herein.
34. All of the witnesses offered by the DNR and Ms. Bobich and Mr. Dierks are qualified to testify as experts and are highly credible.
35. Through stipulations made at the hearing⁵, the Moriaritys concede that this impoundment is a “structure” as the Moriarity Lake impounds a volume of more than 100 acre-feet of water and exceeds 20 feet in height in spots.
36. The initial issue that must be addressed is whether the structure is subject to the requirements of the Dams Safety Act. The DNR “has, on behalf of the state, jurisdiction and supervision over the maintenance and repair of structures in, on, or along the rivers, streams, and lakes of Indiana”. I.C. §14-27-7.5-8(1)(a).
37. The DNR has the burden of proving that the structure is “in, on, or along the rivers, streams and lakes of Indiana”.
38. The parties present differing interpretations of “in, on, or along the rivers, streams and lakes of Indiana”. The Moriaritys argue that the word “of” should be interpreted as meaning possession. They presented the testimony of Dr. Colleen Warren that the word “of” means possession, not location. While Dr. Warren is qualified to testify as to her area of expertise, she is not an attorney. There are specific rules for the interpretation of statutes, which Dr. Warren did not apply in reaching her conclusion that “of”, as used in the context of the statute, means possession. Therefore, her testimony was not persuasive.
39. In statutory construction, “our primary goal is to ascertain and give effect to the intent of the legislature. *Gray v. D & G, Inc.*, 938 N.E.2d 256, 259 (Ind. Ct. App. 2010). The language of the statute itself is the best evidence of legislative intent, and we must give all words their plain and ordinary meaning unless otherwise indicated by statute. *Id.* Furthermore, we presume that the legislature intended statutory language to be applied in a logical manner consistent with the statute’s underlying policies and goals. *Id.* However,

⁵ Findings of fact #2 and 3.

we will not interpret a statute which is clear and unambiguous on its face; rather, we will give such a statute its apparent and obvious meaning. *Ind. State Bd. of Health v. Journal-Gazette Co.*, 608 N.E.2d 989, 992 (Ind. Ct. App. 1993), adopted, 619 N.E.2d 273 (Ind. 1993).” *United States Steel Corp., et al v. Northern Indiana Public Service Corp.* 951 N.E.2d 542, 552, (Ind. Ct. App. 2011).

40. In addition, “Statutory provisions cannot be read standing alone; instead, they must be construed in light of the entire act of which they are a part.” *Deaton v. City of Greenwood*, 582 N.E.2d 882, 885 (Ind. Ct. App. 1991); *Bourbon Mini-Mart v. IDEM*, 806 N.E.2d 14, 20; 2004 Ind. App. LEXIS 586 (Ind. Ct. App. 2004).
41. While possession may be one of the definitions for “of”, it is not the exclusive definition. In keeping with the primary purpose of statutory interpretation, the language of the statute must be applied in a logical manner. Chapter 7.5 requires the owners of structures to comply with specific requirements, including, but not limited to, permitting, reporting, inspections and maintenance. I.C. §14-27-7.5-4 defines “owner”, as “an individual, a firm, a partnership, a copartnership, a lessee, an association, a corporation, an executor, an administrator, a trustee, the state, an agency of the state, a municipal corporation, a political subdivision of the state, a legal entity, a drainage district, a levee district, a conservancy district, any other district established by law, or any other person who has a right, a title, or an interest in or to the property upon which the structure is located.” If one applied the Moriaritys’ definition, that is, that the chapter only applies to structures on streams owned by the State of Indiana, I.C. §14-27-7.5-4 would be completely superfluous.
42. “Further, if a court determines that the statute or rule is ambiguous, it may look to the agency’s interpretation for evidence of the legislative intent. The Indiana Supreme Court, in *Shell Oil v. Meyer*, 705 N.E.2d 962, 976 (Ind. 1998) held, “However, administrative interpretation may provide a guide to legislative intent. ‘A long adhered to administrative interpretation dating from the legislative enactment, with no subsequent change having been made in the statute involved, raises a presumption of legislative acquiescence which is strongly persuasive upon the courts.” *Board of Sch. Trustees v. Marion Teachers Ass’n*, 530 N.E.2d 309, 311 (Ind. Ct. App. 1988); accord *Baker v. Compton*, 247 Ind. 39, 42, 211 N.E.2d 162, 164 (1965). DNR’s long standing interpretation has been that it has

jurisdiction over privately owned structures that meet the requirements in I.C. §14-27-7.5-8(1)(a).

43. The Special ALJ concludes that the legislature intended the Dams Safety Act to apply to any structure in, on or along the rivers, streams or lakes owned by any entity that falls under the definition contained in I.C. §14-27-7.5-4, including, but not limited to, the State of Indiana.

44. The Dams Safety Act applies to the Moriarity structure.

45. The parties also do not agree as to the definition of “stream”. The DNR’s witnesses all provided definitions of “stream” as flowing water through a defined channel. The DNR’s definition is consistent with the definitions provided by the parties as Exhibit 3, which includes definitions from both standard English dictionaries and technical dictionaries. The Moriaritys argue that Ms. Bobich’s definition should be used. She relies upon the Army Corps of Engineers’ definition. However, it is not necessary to use a technical definition of “stream”. The legislature chose to use the word “stream” and chose not to define it. As “stream” has a common meaning, the failure to define it supports the conclusion that the legislative intent must have been to use the plain and ordinary meaning. Further, the DNR’s long standing interpretation relies on the ordinary and common meaning of stream. Applying the rules of statutory construction, “stream” is clear and unambiguous and requires no further interpretation.

46. The Moriaritys argue that due process requires “ascertainable standards” and that the statute does not comply with this requirement. “In order to satisfy due process, an administrative decision must be in accord with previously stated, ascertainable standards.” *Podgor v. Indiana University*, 178 Ind.App. at 258, 381 N.E.2d 1274 at 1283 (Ind.App. 1978). “This requirement is to make certain that administrative decisions are fair, orderly and consistent rather than irrational and arbitrary. The standards should be written with sufficient precision to give fair warning as to what the agency will consider in making its decision.” *Id.*

47. Given that the word “stream” should be given its plain and ordinary meaning, the Moriaritys’ arguments that the statute does not present an “ascertainable standard” must fail.

48. Mr. Smith, Mr. Crosby, Mr. Neese, Mr. Eggen and Mr. Miller all testified that they observed streams on the Moriarity real estate. The water features in areas A, B, D of Exhibit 6D are streams. The fact that water does not flow constantly is not determinative. Nor is size. Moreover, Exhibit 23 provides additional support for the conclusion that streams exist on the Moriarity real estate. The DNR proved by a preponderance of the evidence that the structure is built "in, on, or along the rivers, streams, and lakes of Indiana".
49. Further evidence in support of this conclusion are the culverts that were present to create dry crossings across the stream channels and the presence of tree lines, as shown in Exhibit 7, Photographs 35 and 36.
50. The DNR has met its burden in showing that the Moriarity Lake is a structure built on a stream of Indiana. Therefore, the DNR has jurisdiction over the maintenance and repair of this structure.
51. Having concluded that the Moriarity impoundment is on a stream of the State of Indiana, it is not necessary to determine whether the impoundment is also a lake. However, for the sake of clarity, the question is whether the structure is a "lake" will be addressed. As applicable to the Dams Safety Act and 312 IAC 10.5, lake means "a reasonably permanent body of water substantially at rest in a depression in the surface of the earth, if both the depression and the body of water are of natural origin or part of a watercourse. If part of a watercourse, a lake may be formed by damming a river or stream." 312 IAC 1-1-21(a).
52. A "watercourse" is a running stream of water fed from permanent or natural sources. There must be a stream, usually flowing in a particular direction, though it need not flow continuously. It may be sometimes dry but must flow in a definite channel having a bed or banks. BLACK'S LAW DICTIONARY, Sixth Edition (1990).
53. There is no contention that this is a natural lake. However, the lake was formed by damming the streams that were observed on the Moriarity real estate. These streams fall within the definition of watercourse. The Moriarity impoundment is consistent with definition of "lake".
54. The next issue is whether the structure was properly classified as a high hazard dam. I.C. §14-27-7.5-8(b)(1) states that a "High hazard" dam includes a "structure the failure of

which may cause the loss of life and serious damage to homes, industrial and commercial buildings, public utilities, major highways, or railroads.” If the structure is a high hazard dam, I.C. §14-27-7.5-9 sets out the duties with which the owner must comply, including, having a professional engineer inspect the structure and report to the DNR.

55. 312 IAC 10.5-3-1 states:

(a) The division shall assign whether a dam is classified as:

- (1) high hazard;
- (2) significant hazard; or
- (3) low hazard;

based on best information available.

(b) In making the determination of assignment under subsection (a), the division shall apply existing U.S. Army Corps of Engineers Phase 1 reports and other appropriate documentation.

(c) The division may also consider observations of the dam and the vicinity of the dam, including the risk posed to human life and property if the dam fails.

(1) If an uncontrolled release of the structure's contents due to a failure of the structure may result in any of the following, the dam shall be considered high hazard:

(A) The loss of human life.

(B) Serious damage to:

- (i) homes;
- (ii) industrial and commercial buildings; or
- (iii) public utilities.

(C) Interruption of service for more than one (1) day on any of the following:

- (i) A county road, state two-lane highway, or U.S. highway serving as the only access to a community.
- (ii) A multilane divided state or U.S. highway, including an interstate highway.

(D) Interruption of service for more than one (1) day on an operating railroad.

(E) Interruption of service to an interstate or intrastate utility, power or communication line serving a town, community, or significant military and commercial facility, in which disruption of power and communication would adversely affect the economy, safety, and general well-being of the area for more than one (1) day.

(2) If an uncontrolled release of the structure's contents due to a failure of the structure may result in any of the following, the dam shall be considered significant hazard:

(A) Damage to isolated homes.

(B) Interruption of service for not more than one (1) day on any of the following:

- (i) A county road, state two-lane highway, or U.S. highway serving as the only access to a community
- (ii) A multilane divided state or U.S. highway, including an interstate highway.
- (C) Interruption of service for not more than one (1) day on an operating railroad.
- (D) Damage to important utilities where service would be interrupted for not more than one (1) day, but either of the following may occur:
 - (i) Buried lines can be exposed by erosion.
 - (ii) Towers, poles, and aboveground lines can be damaged by undermining or debris loading.

56. The Moriaritys moved to strike Suzanne Delay's testimony regarding the breach analysis. While there was sufficient evidence presented to call into question some of Ms. Delay's conclusions, there is no basis for striking her testimony. Any evidence of inconsistencies in the report goes to the weight of the evidence, not its admissibility.
57. Further, even without Ms. Delay's testimony, there is sufficient evidence to support the DNR's conclusion that this is a high hazard dam. Visual classification is appropriate in accordance with the rule, as stated above. Mr. Smith and Mr. Crosby testified that there is a strong possibility that damage could be done to nearby structures if the dam would fail. Because of the proximity of the dam to the structures, there is a strong likelihood that serious damage to homes and commercial buildings would result. Exhibit 10, Photograph 181 and Exhibit 11, Photograph 138, shows the proximity of a house and other structures to the dam. The maps in Exhibit 6 show the proximity of a county road (CR 200S/E. 28th Street) to the dam. The DNR presented uncontroverted evidence that this is a high traffic road.
58. The next issue that must be addressed is whether the Moriaritys violated the requirements of the Dams Safety Act. The parties have stipulated that the Moriaritys did not apply for a permit for this dam. Further, the DNR presented uncontroverted evidence that the Moriaritys did not comply with the requirement to have a professional engineer inspect the dam every two (2) years and submit a report to the DNR (I.C. §14-27-7.5-9(a)).
59. The DNR is authorized to assess civil penalties for violations of I.C. §14-27.⁶ The NOV seeks an initial civil penalty of Thirty Five Thousand Dollars (\$35,000) from the

⁶ I.C. §14-25.5-1-1(2) and I.C. §14-25.5-4-3.

- Moriaritys. The DNR assessed a \$10,000 fine for failure to obtain a permit (I.C. §14-27-7.5-8); a \$5,000 fine for failure to file an inspection report for a high hazard dam (I.C. §14-27-7.5-9) in 2005, 2007, 2009 and 2011; and a \$5,000 fine for failure to “perform recommended maintenance, repairs, or alterations to the structure.” I.C. §4-27-7.5-9(c)(2). The DNR presented no evidence regarding the basis for the penalties assessed.
60. In assessing civil penalties, there are four (4) factors which the Commission considers. These are (1) whether the initial offense was deliberate; (2) whether a violation continued unabated after notice by the Department; (3) whether the person committing the violation worked in good faith to remedy the harm; and (4) what immediate or potential harm was presented by the violation to persons, property or the environment?⁷
61. Additional factors that can be considered include: (1) whether the failure to comply was willful or malicious; (2) whether the violator had corrected or attempted to correct the violations; (3) whether the violator took any abatement actions; and (4) whether actual environmental harm is occurring or that such harm is imminent.⁸
62. The following are mitigating factors. It is clear that the Moriaritys made attempts to determine if permits were necessary by contacting the local plan commission, the Army Corps of Engineers, the Indiana Department of Environmental Management and the DNR. The DNR was not able to identify specifically which permit the Moriaritys needed for the construction of this lake. Further, the Moriaritys attempted to correct some of the deficiencies that earlier DNR inspections had identified. In addition, the Moriaritys set aside a portion of the property as a wildlife habitat indicating that the failure to comply with the DNR’s demands was not malicious.
63. As the effective date of the Dams Safety Act is 2002 and the dam was constructed in 2000, no penalty is assessed for failure to obtain a permit.
64. The Subject NOV is divided into two (2) parts. Part A attempts to resurrect an enforcement action begun in 2007 and concluded in 2010 (Cause No. 08-137W).⁹ This enforcement action resulted in an order against John Moriarity only and in favor of the DNR. The DNR attempted to enforce the order in Grant County. Grant County Superior

⁷ *Department of Natural Resources v. Fulton County, et al.* 6 CADDNAR 123 (1993).

⁸ *Integrity Energy Systems, Inc. v. DNR*, 7 CADDNAR 30 (1994).

⁹ As the DNR has presented sufficient evidence to support the findings and conclusions contained in this Order, it is not necessary to determine if this Order should be considered as law of the case, res judicata, or collateral estoppel.

Court issued its Order Dismissing Case Due to Improperly Named Defendant and Inability to Join Party Needed for Just Adjudication on October 11, 2011. The Court refused to enforce the order as the property is held by the Moriaritys as tenants by the entirety and the order from the Commission was against John Moriarity alone. No penalties will be assessed for violations that were the subject of this previous order.

65. Part B of the Subject NOV was based on an inspection done on November 21, 2011. The Moriaritys were aware that the DNR considered this to be a high hazard dam, however, they failed to comply with the requirement that a professional engineer inspect the dam and submit a report to the DNR. Further, the Moriaritys were aware that the DNR had found several alleged deficiencies and had failed to take action to correct these deficiencies.
66. In the DNR's proposed Findings and Conclusions, the DNR proposes an order assessing a penalty of \$763,200 based on continuing penalties assessed for each day that the Moriaritys failed to comply with the NOV. However, I.C. §14-25.5-2-3 states that the NOV "becomes effective without a proceeding under IC 4-21.5-3 unless a person requests administrative review under IC 4-21.5-3-6 within thirty (30) days after receipt of the notice." *Emphasis added.* As the Moriaritys requested administrative review, the continuing penalties did not accrue during the time this matter was pending before the Natural Resources Commission.
67. Mr. Smith's and Mr. Crosby's testimony proves by a preponderance of the evidence that the dam has deficiencies that require correction.

D. NONFINAL ORDER

1. John E. Moriarity and Mae E. Moriarity, both jointly and severally, are hereby ordered to draw down the water level in the Moriarity impounded lake to an elevation of between 840 and 845 feet NAVD. They shall, both jointly and severally consult with a professional engineer duly licensed in Indiana pursuant to IC 25-31 qualified in dam construction, maintenance and safety to develop a safe and appropriate dewatering plan for accomplishing the draw down as herein ordered.
2. The water level of the impounded lake shall be maintained at between 840 and 845 feet NAVD until the Moriaritys, both jointly and severally, have complied with the remainder of this Order as set forth below in Paragraphs 3 and 5.

3. John E. Moriarity and Mae E. Moriarity, both jointly and severally, are hereby ordered to comply with I.C. 14-27-7.5-9(a) by having their dam inspected by a professional engineer licensed pursuant to IC 15-31 and qualified in dam construction, maintenance and safety, and submitting a report of that inspection to the DNR's Division of Water within ninety (90) days of the issuance of a final order in this proceeding. Such engineering inspection shall be completed as required to fulfill the usual and customary requirements of the DNR.
4. John E. Moriarity and Mae E. Moriarity, both jointly and severally, are hereby ordered to comply with I.C. 14-27-7.5-9(b) by completing any maintenance, repair or alteration as required to fulfill the usual and customary requirements of the DNR.
5. In lieu of compliance with Paragraphs 1 through 4 above, John E. Moriarity and Mae E. Moriarity, both jointly and severally, under the direction of a professional engineer pursuant to IC 25-31 and qualified in dam construction, maintenance and safety, dewater, breach and permanently decommission the dam.
6. John E. Moriarity and Mae E. Moriarity, both jointly and severally, are hereby ordered to pay the following civil penalties for their violations of the Dams Safety Act as set forth in the above Findings of Fact, Conclusions of Law:
 - a. \$5,000 for not submitting a high hazard inspection report in 2011 as required by I.C. §14-27-7.5(a)
 - b. \$5,000 for not maintaining and keeping their dam in a state of repair and operating condition required by the exercise of prudence, due regard for life and property and the application of sound and accepted technical principles as required by I.C. §14-27-7.5-9(c).

Dated: April 15, 2015



Catherine Gibbs
Special Administrative Law Judge
Natural Resources Commission
Indiana Government Center North
100 North Senate Avenue, Room N501
Indianapolis, Indiana 46204-2200
(317) 232-8527

A copy of the foregoing was sent to the following:

Eric L. Wyndham
Office of Legal Counsel
Department of Natural Resources
402 W. Washington Street, Room W295
Indianapolis, Indiana 46204

Donn H. Wray, Esq.
Nicholas K. Gahl, Esq.
Katz & Korin PC
The Emelie Building
334 N. Senate Ave.
Indianapolis IN 46204

BEFORE THE
NATURAL RESOURCES COMMISSION
OF THE
STATE OF INDIANA

FILED

MAY 01 2015

IN THE MATTER OF:

JOHN E. MORIARITY and MAE E.
MORIARITY, Husband and Wife
Claimants,

vs.

DEPARTMENT OF NATURAL RESOURCES,
Respondent.

NATURAL RESOURCES COMMISSION
DIVISION OF HEARINGS

Administrative Cause
Number: 12-094W

(NOV VTS-3933-DM)

**MORIARITYS' OBJECTIONS TO FINDINGS OF FACT,
CONCLUSIONS OF LAW AND NONFINAL ORDER,
AND REQUEST FOR A HEARING ON THE RECORD**

The Moriaritys object to the finding of DNR jurisdiction over the structure on their land and its classification as a high hazard dam. As a matter of law, no jurisdiction exists and the structure cannot be classified as a high hazard dam pursuant to the plain language of the statute cited by the Court. More specifically:

Issue One - The Court erred as a matter of law by post-hoc adopting a definition of the word "stream" never previously stated by DNR as the standard to be used to determine jurisdiction, and therefore there was not an ascertainable standard establishing DNR jurisdiction (especially in light of the other objections raised below). Based upon that post-hoc adoption of that definition, the Court erred in finding the existence of jurisdiction.

Issue Two - The Court erred as a matter of law by post-hoc adopting a "plain and ordinary" meaning of the word "stream" over other "plain and ordinary" definitions that

would not support the finding of a stream on the Moriarity property. DNR witnesses testified that some of the “plain and ordinary” definitions of streams as contained in Ex. 3 would result in the conclusion that there are no streams on the Moriarity property. In the face of those plain and ordinary meanings of “stream” not bestowing jurisdiction, the Court erred in selecting “flowing water through a defined channel” (Conclusion of Law ¶45), and finding the existence of jurisdiction on the basis of that one definition among many.

Issue Three - The Court erred as a matter of law by post-hoc selecting a certain map to show the presence of “streams” on the Moriarity property when no map was previously designated by the agency as the reference for such a determination, and therefore there was not an ascertainable standard for demonstrating DNR jurisdiction. Based upon that post-hoc adoption of that certain map, the Court erred in finding the existence of jurisdiction. The post-hoc selection of a particular map for the purpose of finding DNR jurisdiction is particularly egregious because the most “widely used map” (7.5 minute quadrangle) (described as such in DNR publications) does not show any streams on the Moriarity property, and neither does DNR’s own published map entitled “Streams & Lakes of Indiana.”

Issue Four - The Court erred as a matter of law in finding jurisdiction over the structure on the Moriarity property given its finding that “the DNR was not able to identify specifically which permit the Moriaritys needed for the construction of the lake.” The absence of any identifiable permit establishes that the Moriaritys could not determine, through previously stated ascertainable standards, the existence of any

jurisdiction on the part of DNR. The Court thus erred as a matter of law in finding the existence of jurisdiction.

Issue Five - The Court erred as a matter of law by finding the Moriarity structure to be in, on, or along a stream of Indiana given the lack of evidence that there was a stream on the Moriarity property during the structure's construction in 1998-2000, at the time the Dam Safety Act became effective in 2002, or from the date of the Notice of Violation in 2012 to present day. DNR's only evidence of a stream on the Moriarity property is from 2008 – four (4) years before the NOV giving rise to this litigation. That statute speaks in present tense, and only the field inspection of Heather Bobich in 2012 (the year of the NOV) relates to whether the Moriarity structure is presently in, on, or along a stream of Indiana. (Ind. Code 14-27-7.5-8(1)(a)). The Court thus erred as a matter of law in finding the existence of jurisdiction.

Issue Six - The Court erred as a matter of law by finding that the Moriarity structure was in, on, or along a stream of Indiana because there was not “substantial and reliable” evidence upon which to make that finding. Ind. Code 4-21.5-3-27(d) requires, “Findings must be based upon the kind of evidence that is substantial and reliable.” The Court thus erred as a matter of law in finding the existence of jurisdiction.

Issue Seven - The Court erred as a matter of law by finding the Moriarity structure to be a “high hazard dam”, contrary to the plain language of 312 IAC 10.5-3-1. As cited in the Court's decision, that regulation requires:

- (a) The division shall assign whether a dam is classified as:
 - (1) high hazard;

(2) significant hazard; or
(3) low hazard;
based on best information available.

(b) In making the determination of assignment under subsection (a), the division shall apply existing U.S. Army Corps of Engineers Phase I reports and other appropriate documentation.

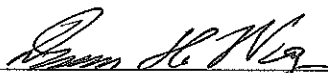
(Emphasis added). The record is devoid of any required “existing U.S. Army Corps of Engineers Phase I report and other appropriate documentation.” The conjunctive in subsection (b) requires that a high hazard determination may only be made if a U.S. Army Corps of Engineers Phase I report exists. None exists. The high hazard determination by the Court is thus error as a matter of law.

Issue Eight - The Court erred as a matter of law by finding the Moriarity structure is a “lake” as defined by 312 IAC 1-1-21(a) because it is not part of a “watercourse.” The Court’s post-hoc adoption of the definition of “watercourse” from Black’s Law Dictionary, as opposed to its “plain and ordinary” meaning as set forth by common dictionaries (like the Court used for stream) or in technical dictionaries, was neither previously stated, ascertainable, nor consistent with the evidence. Because the Moriarity structure is not in, on, or along a stream of Indiana, it is similarly not “part of a watercourse.” The Court thus erred as a matter of law in finding the existence of jurisdiction.

Pursuant to 312 IAC 3-1-12(f), the Moriaritys request that the hearing before the Natural Resource Commission Committee be on the record with a court reporter.

Respectfully submitted,

KATZ & KORIN, PC

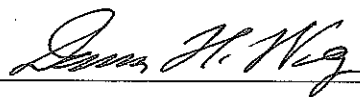
By 
Donn H. Wray (Atty. No. 1643-49)
Nicholas K. Gahl (Atty. No. 27842-49)
The Emelie Building
334 North Senate Avenue
Indianapolis, Indiana 46204
Phone: (317) 464-1100
Fax: (317) 464-1111

*Attorneys for Claimants,
John E. Moriarity and Mae E. Moriarity*

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing has been served upon the following counsel of record via first class United States mail, postage prepaid, this 1st day of May, 2015:

Eric L. Wyndham
Joy Grow
Legal Counsel
Department of Natural Resources
Indiana Government Center North
402 West Washington Street Room N295
Indianapolis, IN 46204



Donn H. Wray (Atty. No. 1643-49)
Nicholas K. Gahl (Atty. No. 27842-49)
KATZ & KORIN, PC
The Emelie Building
334 North Senate Avenue
Indianapolis, Indiana 46204
Phone: 317-464-1100
Fax: 317-464-1111

FILED

MAY 22 2015

BEFORE THE
NATURAL RESOURCES COMMISSION
OF THE
STATE OF INDIANA

NATURAL RESOURCES COMMISSION
DIVISION OF HEARINGS

IN THE MATTER OF:)
)
JOHN E. MORIARITY and MAE E.)
MORIARITY, Husband and Wife) Administrative Cause
Claimants,) Number: 12-094W
)
vs.)
)
DEPARTMENT OF NATURAL RESOURCES,) (NOV VTS-3933-DM)
Respondent.)

**RESPONDENT'S RESPONSE TO CLAIMANTS' OBJECTIONS TO FINDINGS OF FACT,
CONCLUSIONS OF LAW, AND NONFINAL ORDER**

The Respondent Department of Natural Resources ("DNR"), by counsel, responds to the Claimants' objections to the Special Administrative Law Judge's ("ALJ") Finding of Facts, Conclusions of Law, and Non-Final Order and states the following (Respondent is responding to each issue as labeled by Claimants):

I. Issue One

The ALJ did not err by using a common and ordinary meaning of the word "stream." The Dam Safety Act (Ind. Code § 14-27-7.5-8) does not define the word "stream." The goal in statutory construction is to determine and give effect to legislative intent. *Hall Drive Ins., Inc. d/b/a Don's Hall's Guesthouse v. City of Fort Wayne*, 773 N.E.2d 255, 257 (Ind. 2002). Words are to be given their plain, ordinary, and usual meaning, unless a contrary purpose is shown by the statute or ordinance itself. *Nora Northside Community Council, Inc. v. Pinnacle Media, LLC & DNR*, supra at 107; *MDM, Inv. v. City of Carmel*, 740 N.E.2d 929, 934 (Ind. Ct. App. 2000); *JKB, Sr. v. Armour Pharm. Co.*, 660 N.E.2d 602, 605 (Ind. Ct. App. 1996).

The ALJ determined that since the legislature did not define the word “stream,” they intended on applying the common meaning. This comports with the rules of statutory construction. Further, DNR’s witnesses consistently testified that the definition of a stream was flowing water through a channel, consistent with the plain and ordinary meaning of the word. The ALJ’s finding not only comports with the rules of statutory construction, but also is supported by ample credible evidence in the record.

The Claimants argued only one definition of the word “stream” is appropriate—the Army Corps of Engineers’ technical definition. The legislature could have opted to use this definition, but as the ALJ correctly decided, they did not and instead intended to apply the common and ordinary meaning of the word “stream.” Further, since “stream” has a plain and ordinary meaning, the ALJ was correct in deciding that there was in fact an ascertainable standard and that the statute complied with this requirement of due process.

II. Issue Two

The ALJ can use whatever plain and ordinary definition as long as it is based in the evidence presented. Just because the ALJ did not choose the definition of the word “stream” that supported the Claimants’ argument does not mean that she erred as a matter of fact or as a matter of law. There was an abundance of evidence in the record to support the ALJ’s finding that streams exist on the Moriarity real estate. DNR personnel—subject matter experts—observed streams on the Moriarity real estate. United States Geological Survey personnel also identified streams on the Moriarity real estate. DNR presented a wealth of other documentation showing the presence of streams such as aerial photographs, U.S. Geological Survey’s StreamStats, and the U.S. Department of Agriculture’s Soil Survey.

The Claimants offered no other definition of the word “stream” other than that proffered by Heather Bobich, which was the technical definition derived from the Army Corps of Engineers. Bobich’s definition is rigid, and Claimants rely on it to get around the more inclusive “plain, ordinary, and usual meaning” required by Indiana law in applying proper principals of statutory construction. Thus the ALJ correctly determined the definition of the word “stream,” and the credible evidence on the record supports this finding.

III. Issue Three

Credible evidence at the hearing showed that it was impossible for 7.5 quad maps and the “Streams & Lakes of Indiana” maps to show streams because of their scale. DNR provided an abundance of other evidence that did show the presence of streams on the Moriarity real estate. The ALJ was correct in finding that the DNR proved by a preponderance of the evidence that the structure is built “in, on, or along the rivers, streams, and lakes of Indiana.”

IV. Issue Four

The ALJ did not err in finding the existence of jurisdiction. The Claimants’ attempt to determine whether or not a permit was necessary for construction of their lake and dam is irrelevant to whether or not the DNR has jurisdiction over the dam. There is sufficient evidence on the record to support the conclusion that the Moriarity’s dam is high hazard subject to regulation by the DNR.

V. Issue Five

“[A]n applicant must not gain an advantage in the licensure process because natural resources were destroyed and are less obviously ascertainable as a result of the unlicensed activities.” *Shoaff Mullin and DeVille v. Ft. Wayne Zoological Society and DNR*, 8 CADDNAR 157 (2000). When the Moriaritys constructed their dam they destroyed all existing evidence of

stream channels under the footprint of the dam and lake. DNR offered credible evidence, however, showing the existence of streams at the site of the dam and lake, though some were altered and degraded. The ALJ's finding that streams exist on the Moriarity property is based on credible and substantial evidence.

VI. Issue Six

The ALJ determined that the Moriarity dam is on a stream of Indiana. That finding was based upon substantial and reliable evidence in the record. DNR personnel—subject matter experts—observed streams on the Moriarity real estate. United States Geological Survey personnel also identified streams on the Moriarity real estate. DNR presented a wealth of other documentation showing the presence of streams such as aerial photographs, U.S. Geological Survey's StreamStats, and the U.S. Department of Agriculture's Soil Survey. Thus, the ALJ did not err in finding jurisdiction.

VII. Issue Seven

Claimants' only cite part of the Rule regarding dam hazard classification. 312 Ind. Admin. Code § 10.5-3-1 also provides that "[t]he division may also consider observations of the dam and the vicinity of their dam, including the risk posed to human life and property if the dam fails." 312 Ind. Admin. Code § 10.5-3-1(c)(1) says that if a dam breach could result in serious damage to homes, industrial buildings, or interrupt service for more than one (1) day on a county road then the dam shall be considered high hazard. Evidence on the record showed that there is a strong likelihood that serious damage to homes and commercial buildings would result if the dam fails. In addition, uncontroverted evidence showed that the dam is also in proximity of a

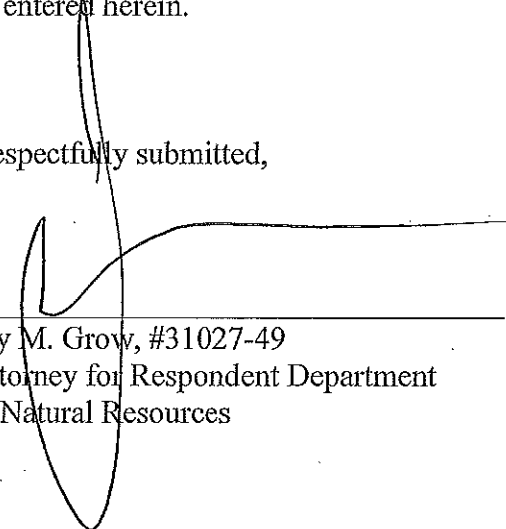
county road that is high traffic. The determination that the dam is high hazard comports with 312 Ind. Admin. Code § 10.5-3-1 and is supported by the evidence on the record.

VIII. Issue Eight

This issue is entirely irrelevant. Because the ALJ found that the Moriarity dam is on a stream of Indiana, DNR has jurisdiction over the maintenance and repair regardless of whether the body of water is a "lake." Regardless, the ALJ's finding that the body of water is a "lake" is based on evidence in the record.

WHEREFORE, DNR requests that the AOPA Committee of the Natural Resources Commission affirm the decision of the ALJ entered herein.

Respectfully submitted,

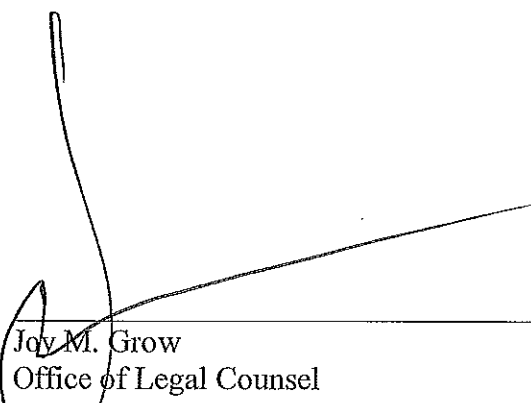


Joy M. Grow, #31027-49
Attorney for Respondent Department
of Natural Resources

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was served by United States First Class Mail, postage prepaid, on the 22nd day of May, 2015, on the following:

Donn H. Wray
KATZ & KORIN
The Emilie Building
334 North Senate Avenue
Indianapolis, IN 46204



Joy M. Grow
Office of Legal Counsel
Department of Natural Resources
402 W. Washington Street, Rm W295
Indianapolis, IN 46204
317.233.9731
jgrow@dnr.in.gov